STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 7, 2011
v SEAN CHANDLER, Defendant-Appellant.	No. 296098 Wayne Circuit Court LC No. 2009-019351-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
V SEAN CHANDLGER, a/k/a SEAN CHANDLER, Defendant-Appellant.	No. 296099 Wayne Circuit Court LC No. 2009-020949-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
V SEAN CHANDLER, Defendant-Appellant.	No. 299304 Wayne Circuit Court LC No. 2009-019352-FH

Before: CAVANAGH, P.J., and JANSEN and SERVITTO, JJ.

PER CURIAM.

In these consolidated appeals, defendant appeals as of right the sentences imposed after his bench trial convictions. In docket no. 296098, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and resisting and obstructing a police

officer, MCL 750.81d(1). In docket no. 296099 defendant was convicted of assault with intent to do great bodily harm less than murder. In docket no. 299304, defendant was convicted of assault with intent to do great bodily harm less than murder, and assault and battery, MCL 750.81. Defendant was sentenced to concurrent terms of 6 ½ to 10 years' imprisonment on each of the assault with intent to do great bodily harm less than murder convictions, 1-2 years on the resisting and obstructing conviction, and 93 days on the assault and battery conviction. Because the trial judge gave no explanation for the extent of the upward departure from the sentencing guidelines, we remand these cases to the trial court for resentencing and for an explanation of the extent of any departure made on remand. In all other respects, we affirm.

The three separate events leading to defendant's charges in these matters took place in the area of Denby High School in Detroit, Michigan in the summer of 2009. On June 5, 2009, 15-year-old William Morris was walking home from the school when defendant and another man approached him, telling him that they did not like him. According to Morris, the man with defendant began hitting him in the face and defendant thereafter joined in, punching Morris in his face and head. The two men struck Morris over 10 times, breaking his jaw in two places.

On July 13, 2009, Korey Terry was leaving the high school after his summer classes had ended, when defendant called out to him. Defendant asked Terry, who had never had any personal contact with defendant, if he had a problem with defendant and his friends. When Terry responded that he did not, defendant began punching him in the face. Terry fell to the ground and defendant kicked him and stomped on his face. Defendant eventually went over to address Terry's friend, Levert Brown, and Terry ran. He suffered a concussion as a result of the beating.

Levert Brown was leaving the school around the same time as Terry, when he saw defendant and several others punching Terry. According to Brown, Terry was on the ground and defendant and his co-horts were punching and kicking Terry, and stomping on his head. Defendant then approached Brown, grabbing him by the throat. Brown punched defendant in the face, and defendant began punching Brown. Defendant's friends came over to the two and also began hitting Brown. When Brown fell to the ground, defendant and his friends kicked and stomped on Brown several times. Brown suffered a fractured nose and bruised ribs in the attack.

On July 14, 2009 Kevin Smith was walking home alone after summer classes at the high school when defendant and several other men came up behind him. Defendant hit Smith and, when Smith hit him back, defendant's friends pulled Smith to the ground. They all punched Smith and kicked him in the face. The high school football team was practicing on the other side of a fence near Smith and, when they saw what was happening, they yelled for defendant and his friends to stop. The football coach told Smith to come over onto the players' side of the fence. When one of the football players jumped over the fence toward the assault, defendant and his friends ran off. Smith, who suffered a fractured jaw and chipped tooth, was taken into the school and the police were called.

After arriving at the school, Smith and several other students gave the police a description of the event and of defendant. The police located defendant near the school shortly after the assault, but when defendant saw the police, he ran. When the police caught up with defendant a short time later, defendant was combative until one of the officers pepper sprayed him. Defendant was placed under arrest and ultimately charged in connection with the assaults

that took place on the three dates indicated above. As previously stated, defendant was convicted of three counts of assault with intent to do great bodily harm less than murder, one count of assault and battery, and one count of resisting and obstructing a police officer.

On appeal, defendant contends that he is entitled to resentencing due to several improprieties with respect to the sentences imposed. Specifically, defendant claims that offense variables 7, 9, 10, 14, and 19 were misscored. We address each challenged OV in turn, as it would apply to each of the three specific incidents, scored separately.

The proper interpretation and application of the legislative sentencing guidelines, MCL 777.11 *et seq.*, are legal questions that this Court reviews de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Thus, if there is any evidence in support, the scoring decision will be upheld. *Id*.

Defendant was assessed 50 points for OV 7, which addresses aggravated physical abuse. 50 points are to be assessed under this variable when "a victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). Here, OV 7 was scored at 50 points based upon the trial court's finding that the victims were subject to extreme or prolonged pain and humiliation, inflicted for defendant's gratification. The record establishes that in the Morris case, defendant and a friend approached the victim and, for no apparent reason, began beating him about the face. The victim was alone at the time and did not fight back. Morris was hit so hard, his jaw was broken. This treatment could easily be seen as excessive brutality and defendant's conduct was obviously designed to substantially increase the fear and anxiety of Morris. A score of 50 points was thus appropriate for OV 7 in the Morris matter.

In the Terry/Brown incident, the two victims were in the vicinity of others when the assaults took place, but both were singled out. Neither victim knew the defendant personally, but Terry was nevertheless punched, kicked, and had his face stomped by defendant in front of his friends. Similarly, Brown was choked, punched, and stomped by defendant. Given the senseless nature and the brutality of the assaults, 50 points were properly scored for OV 7 in the Terry/Brown matter.

50 points were also appropriate in the Smith incident. Smith was walking alone when defendant came up behind him and hit him. Defendant, who had friends with him, continued to beat and kick Smith until the football coach and players in an adjoining area yelled at him to stop. Smith suffered a fractured jaw and a chipped tooth. Again, we are presented with a victim who had no prior interaction with defendant and who was singled out and beaten for no apparent reason. Further, the beating continued until Smith was seriously injured. This evidence supports an assessment of 50 points for OV 7 in this matter.

Defendant next contends that the evidence did not support an assessment of ten points for OV 9. We agree, with respect to the Morris and Smith matters.

OV 9 addresses the number of victims. Ten points are to be assessed for OV 9 when there were "2 to 9 victims who were placed in danger of physical injury or death. . ." MCL 777.39. No points are assessed under this OV if there were fewer than two victims placed in danger of physical injury or death. In scoring this variable, only people placed in danger of injury or loss of life when the sentencing offense was committed, or, at the most, during the same criminal transaction, should be considered. *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008).

MCL 777.21 instructs us to "'[f]ind the offense category for *the offense* ... [and] determine the offense variables to be scored for that offense category....' (Emphasis added.) MCL 777.21(2) instructs us to 'score *each offense*' if 'the defendant was convicted of multiple offenses....' (Emphasis added.). *Sargent*, 481 Mich at 347-348; 750 NW2d 161 (2008). "This language indicates that the offense variables are generally offense specific. The sentencing offense determines which offense variables are to be scored in the first place, and then the appropriate offense variables are generally to be scored on the basis of the sentencing offense." *Id*.

In these consolidated matters, while the Terry/Brown case unquestionably involved two victims who were both subject to physical injury, and a score of ten points for OV 9 would thus be proper in that case, the same cannot be said for the other two cases.

In the Morris matter, the evidence clearly established that Morris was alone when approached and that he was the only victim placed in danger of physical injury. In that matter, then, OV 9 would be properly scored at 0 points. The same is true in the Smith matter. Smith was walking alone and, though football players and a football coach were on the other side of a fence than defendant and the victim, there is no indication that any of the football players or the coach was placed in danger of physical injury. Indeed, when the victim climbed over the fence toward the football players, defendant left. OV 9 in the Smith case should thus be scored at 0.

With respect to OV 10, defendant was assessed 15 points on the basis that he engaged in predatory conduct. According to the trial court, defendant sought out victims who were "minding their own business" and followed them and such actions on his part justified a score of 15 points. However, the record discloses no facts that would support an assessment of 15 points in any of these three cases.

OV 10 addresses the exploitation of a vulnerable victim. 15 points are to be assessed under this variable where predatory conduct was involved. MCL 777.40 provides:

> (3) As used in this section:
>
> (a) "Predatory conduct" means preoffense conduct directed at a victim for the primary purpose of victimization.
>
> (b) "Exploit" means to manipulate a victim for selfish or unethical purposes.
>
> (c) "Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.

Notably, MCL 777.40(2) provides, that "the mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability."

Points are to be assessed under OV 10 only when "it is readily apparent that a victim was 'vulnerable,' i.e., was susceptible to injury, physical restraint, persuasion, or temptation." *People v Cannon*, 481 Mich 152, 158-159; 749 NW2d 257 (2008). According to *Cannon*, several factors are to be considered in deciding whether a victim was vulnerable:

> (1) the victim's physical disability; (2) the victim's mental disability; (3) the victim's youth or agedness; (4) the existence of a domestic relationship; (5) whether the offender abused his or her authority status; (6) whether the offender exploited a victim by his or her difference in size or strength or both; (7) whether the victim was intoxicated or under the influence of drugs; or, (8) whether the victim was asleep or unconscious.

Further, as explained in *Cannon*, crucial to a trial court's determination whether to assess 15 points for "predatory conduct," the sentencing judge must first determine whether there was "preoffense conduct." Use of the word "preoffense" indicates that to be considered predatory, the conduct must have occurred before the commission of the offense. *Id.* at 161. The conduct must also have been "directed at a victim" before the offense was committed. For purposes of determining whether a defendant's exploitation of a victim was predatory in nature as to permit assessment of 15 points OV 10, the sentencing court considers the following questions: (1) did the offender engage in conduct before the commission of the offense; (2) was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation; and (3) was victimization the offender's primary purpose for engaging in the preoffense conduct. *People v Waclawski*, 286 Mich App 634, 685; 780 NW2d 321(2009). If the court can answer all these questions affirmatively, then it may properly assess 15 points for OV 10 because the offender engaged in predatory conduct under MCL 777.40. *Cannon*, 481 Mich at 162. *Cannon* provides the following by way of illustrative examples:

> A lion that waits near a watering hole hoping that a herd of antelope will come to drink is not engaging in conduct directed at a victim. However, a lion that sees antelope, determines which is the weakest, and stalks it until the opportunity arises to attack it engages in conduct directed at a victim. Contrast that with an individual who intends to shoplift and watches and waits for the opportunity to commit the act when no one is looking. The individual has not directed any action at a victim. *Id*, 481 Mich at 160.

In the matters at hand, the trial court did not properly and specifically analyze whether defendant engaged in preoffense conduct directed at a vulnerable victim for the primary purpose of victimization. The trial court did indicate that defendant approached the victims as they were "minding their own business" and followed them, and also mentioned the size and age disparity between defendant and his victims. Assuming that each victim was "vulnerable," the trial court nevertheless mentioned no preoffense conduct on defendant's part that would suggest predatory conduct, and the record bears no evidence of the necessary preoffense conduct.

The first factor to be considered in determining the existence of predatory conduct is whether the offender engaged in conduct *before* the commission of the offense. *Waclawski*, 286 Mich App at 685. There is no evidence to establish this factor. The record reveals that none of the victims had any prior personal contact with defendant. All of the victims were walking within the vicinity of their school when the incidents occurred and while Smith, Terry, and Brown were attending summer school classes at the school, Morris had attempted to go to the school for another purpose and found it closed. Both Morris and Smith were alone when defendant approached them and, without provocation, immediately began beating them. Terry and Brown were in the vicinity of each other and other students when defendant called each of them out and again, almost immediately began beating them.

Notably absent is any evidence that defendant was waiting for any of the victims, specifically, or that defendant selected a specific time, place, or manner in which he expected to encounter the victims. These incidents did not begin as mutual exchanges that suddenly escalated. Instead, they were immediate and unexpected. Moreover, all of the victims were in public, not secluded places, and there were witnesses to all of the assaults. There is no indication that defendant was specifically targeting any of the victims after an assessment of their vulnerability, rather than defendant simply have happened upon them and taken advantage of the situation. Like the lion in *Cannon*, defendant appears to have simply frequented the area of the high school with his friends and, when he eventually encountered someone whom he felt he could beat in an altercation appeared, immediately began hitting them.[1] Given the lack of any evidence that defendant engaged in preoffense conduct, scoring OV 10 at 15 points for predatory conduct was inappropriate. However, considering the size disparity between defendant and the victims, as noted by the trial court, the record did support a score of 5 points for OV 10 ("The offender exploited a victim by his or her difference in size, or strength, or both. . .(MCL 777.40(1)(c)).

Defendant next challenges the assessment of 10 points for OV 14, MCL 777.44. According to defendant, the trial court erred in scoring 10 points for the case involving Morris because Morris testified that the defendant's friend was the one who approached and hit him first. We agree.

OV 14 addresses the offender's role. Ten points are to be assessed if the defendant was a leader in a multiple offender situation. MCL 777.44(1)(a). In all three of these matters, defendant was accompanied by friends when the attacks took place. With respect to the Morris case, Morris testified that defendant and another man approached him and that the other man told him he did not like Morris. Defendant then said he also did not like Morris. According to

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[1] Defendant testified at trial that he at no time hit Morris; that he hit Terry after a friend of defendant's pointed out Terry and told him that Terry and others had tried to jump him; that he hit Brown only after Brown first swung at him; and that, he does not recall who started the fight between he and Smith, but that it was a mutual one-on-one fight.

Morris, the other man then began hitting him in the face, and defendant thereafter started hitting him as well.

Pursuant to MCL 777.44(2)(b), there may be more than one leader, but only where 3 or more offenders are involved. Where, as in the Morris matter, there were only two offenders involved and Morris unequivocally testified that the man with defendant initially spoke to him and initiated the attack on him, defendant cannot be deemed the leader. Thus, OV 14 should be scored at 0 points in the Morris case. Defendant does not challenge the score of 10 points for OV 14 in the other two cases.

Finally, defendant challenges his score of 10 points for OV 19. OV 19 concerns a threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services. Ten points are to be assessed for OV 19 if the offender otherwise interfered with or attempted to interfere with the administration of justice. MCL 777.49(c).

The evidence in this matter indicates that when defendant was arrested for the Smith offense, he ran from and then struggled with police officers. Defendant continued to struggle until subdued with pepper spray. In *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004), our Supreme Court held that providing a false name to police constitutes interference with the administration of justice, such that OV 19 may be scored for such conduct. Where, as here, defendant fought with police officers when lawfully placed under arrest, defendant obviously interfered with the police in the performance of their duties, and thus interfered with the administration of justice. In the Smith case, then, 10 points would be appropriately scored for OV 19. There is no similar evidence with respect to the Morris and Terry/Brown cases. Thus, OV 19 would be appropriately scored at 0 points in the Morris and Terry/Brown cases.

Defendant contends that the trial court improperly aggregated the three separate cases, scoring them as one, which led to an "unknown" departure from the sentencing guidelines. However, scoring the incidents separately and consistent with record, as set forth above, there would be no difference in defendant's guidelines range.

Defendant did not and does not challenge his assessment of 25 points for prior record variables. With respect to offense variables, if scored independently defendant would be properly assessed 120 points for both the Terry/Brown and Smith cases, and 100 points for the Morris case. The offenses thus would all fall within the D-VI cell, with guidelines of 34-67 months—the exact cell and guidelines range employed by the trial court.

Moreover, MCL 777.21(2) provides that if the defendant was convicted of multiple offenses, subject to MCL 771.14, each offense is to be scored. MCL 771.14 indicates that if a defendant is to be sentenced under the sentencing guidelines, a presentencing investigation report must be prepared and must contain:

> (*ii*) Unless otherwise provided in subparagraph (*i*), for each crime having the highest crime class, the sentence grid in part 6 of chapter XVII that contains the recommended minimum sentence range.

(*iii*) Unless otherwise provided in subparagraph (*i*), the computation that determines the recommended minimum sentence range for the crime having the highest crime class.

MCL 771.14 (2)(e).

MCL 777.21(2) has thus been interpreted to mean that if a single offender is convicted of multiple offenses and the sentences will be served concurrently, a sentencing information report (SIR) must be prepared only for the highest crime class; a sentencing court is not required to score the guidelines for lesser class felony convictions in such cases. *People v Mack*, 265 Mich App 122, 127-129; 695 NW2d 342 (2005).

In this matter, the offense carrying the most significant penalty in each case was assault with intent to do great bodily harm and the sentences were to be served concurrently. Thus, a sentencing information report was required for this offense only. Though a SIR appears to have been prepared for each case, because of the concurrent nature of the sentences, the trial court was free to use the highest scoring SIR to calculate defendant's sentence.

An error in the scoring of the guidelines that would not, when corrected, result in a different recommended minimum term range does not require resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). And, where, as discussed below, the trial court properly departed upward from the guideline range, it is clear that the trial court would have imposed a sentence that departed from the guidelines regardless of the 10 point difference in the offense variables, and remand for this error is thus unnecessary. See, e.g. *People v Mutchie*, 468 Mich 50; 658 NW2d 154 (2003).

Defendant next asserts that the trial court significantly departed from the guidelines without providing objective and verifiable reasons for doing so, and without articulating reasons for the particular departure and the extent of the same. We agree that the trial court failed to articulate the reasons for the extent of the departure, and thus remand for an articulation of the same.

In reviewing a trial court's grounds for departing from the sentencing guidelines, this Court reviews for clear error the trial court's factual finding that a particular factor in support of departure exists. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). Whether the factor is objective and verifiable, though, is a question of law that this Court reviews de novo. *Id.* Finally, this Court reviews for an abuse of discretion the trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence guideline range. *Id.* at 264-265.

A trial court is generally required to impose a minimum sentence in accordance with the appropriate sentence range. *People v Lucey*, 287 Mich App 267, 270; 787 NW2d 133 (2010). A trial court may, however, depart from the range set forth in the guidelines "if it states on the record a substantial and compelling reason for doing so." *Id.*, citing MCL 769.34(2) and (3). Substantial and compelling reasons for departure exist only in exceptional circumstances and the reasons must, to be considered substantial and compelling, "be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's

attention." *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). However, a trial court may not base a departure on characteristics of the offense or the offender already considered in scoring the guidelines offense variables absent a finding that the characteristic was given inadequate or disproportionate weight. *People v Young*, 276 Mich App 446, 454-455; 740 NW2d 347 (2007). Finally, a substantial and compelling reason articulated by the trial court as meriting a departure from the sentencing guidelines must justify the particular departure at issue. *People v Havens*, 268 Mich App 15, 17-18; 706 NW2d 210 (2005).

According to the trial court's calculations (and ours under the correct OV scores), defendant's minimum sentence fell within the range of 34-67 months. The trial court, however, sentenced defendant to 6 ½ -10 years on each assault with intent to commit great bodily harm charge, an upward departure of 11 months. The reasons cited by the trial court for the departure were that the top of the OV level was 75 points, but defendant had 130 points, thus far exceeding the very top level calculable under the OV factors, and that the guidelines did not adequately take into account the brutality that was inflicted on the victims in these matters. The trial court also noted that the incidents all took place outside of the victims' school and that is the place, outside of one's home, where one ought to feel safe. The trial court further found that defendant's roaming the campus, like a shark, created an intimidating environment.

The fact that defendant's OV level (even at the corrected scoring) far exceeded that at the top of the range is an objective and verifiable fact that would keenly grab a court's attention. Defendant's OV level surpassing the highest level by over 50% indicates that the facts surrounding the offenses were not adequately accounted for in the guidelines.

The fact that the offenses took place in what should otherwise be a safe environment is also objective, verifiable, and keenly and irresistibly grabs the court's attention. Most of the victims were present at the school for summer classes and were there for the specific purpose of gaining an education. Defendant's behavior in attacking lone students for no apparent reason, on several different dates, placed them in fear for their safety and jeopardized their education. School should, as the trial court noted, be a place where one feels safe and secure, and defendant took that sense of security away from the students at Denby for a period of time.

Finally, while defendant received the highest points allowable for OV 7 (aggravated physical abuse), the trial court's indication that the guidelines did not adequately take into account the brutality of the offenses was objective and verifiable.[2] The victims in this matter appear to have been randomly selected for physical abuse. The abuse was perpetrated by defendant, who never acted alone, but had friends present, and singled out those whom were effectively alone and had no prior contact with defendant and, thus, no reason to anticipate or expect the assaults. And, defendant did not merely punch the victims once, but subjected the victims to unrelenting punches, kicks, and stomps to their faces, causing serious injury.

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[2] Even if this stated reason were not sufficient to justify the upward departure, the other two stated reasons would serve to suffice.

Based upon the above, we are satisfied that the trial court cited substantial and compelling reasons to justify a departure from the guidelines. However, as noted by defendant, "the statutory guidelines require more than an articulation of reasons for *a* departure; they require justification for the *particular* departure made." *People v Smith*, 482 Mich 292, 303; 754 NW2d 284 (2008). Here the trial judge gave no explanation for the *extent* of the departure, independent of the reasons given to impose a departure sentence. As indicated in *Smith*, "if the connection between the reasons given for departure and the extent of the departure is unclear, then the sentence cannot be upheld. *Id*. at 314. As a result, we must remand these cases to the trial court for resentencing and for an explanation of the extent of any departure made on remand.

Finally, defendant argues that his trial counsel was ineffective for failing to make proper objections at sentencing. Specifically, defendant contends that trial counsel should have objected to the scoring of OV 19, should have objected to the trial court's improper aggregation of the three cases into one for purposes of scoring the sentencing guidelines, and should have objected to the trial court's upward departure. Given our conclusions with respect to the sentencing issues presented by defendant, we need not address defendant's claims of ineffective assistance.

Remanded for resentencing and an explanation of the extent of the upward departure, if any. Affirmed in all other respects. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Deborah A. Servitto